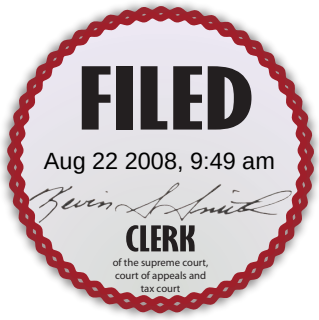

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IN THE
COURT OF APPEALS OF INDIANA

HUSSEIN MROUEH and PHILLIP K. DABAGIA, Appellants-Defendants, vs. LUKE OIL, INC., Appellee-Plaintiff.	))))))))))	No. 45A05-0711-CV-611

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0501-CC-7

August 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Hussein Mroueh and Phillip K. Dabagia appeal from the trial court's entry of summary judgment in favor of Luke Oil, Inc. ("Luke Oil"). Mroueh and Dabagia raise three issues for our review, which we restate as the following dispositive issue: whether the trial court erred in granting summary judgment for Luke Oil.

We affirm.

FACTS AND PROCEDURAL HISTORY

On June 14, 2002, M & D, Inc. ("M & D"),[1] by Mroueh, entered into a purchase agreement with Jack C. Saylor and Vista, L.L.C. (collectively, the "Seller"), for the purchase of a gas station and convenience store located at the intersection of U.S. Highway 6 and State Road 149 in Porter County. Pursuant to the purchase agreement, M & D agreed to

> assume in writing and be bound by all written agreements still in effect between the Seller and [Luke Oil] or Citgo Petroleum Corporation, which agreements include the Sales and Operation Contract dated January 21, 1999[,] and any amendments thereto between [Seller] and [Luke Oil] and the Citgo Petroleum Corporation Agreements and undertakings with respect to the operation of the business of the Seller as a Citgo petroleum products sales facility . . . (the "Citgo Agreements").

Appellee's App. at 13. At the time the parties entered into the purchase agreement, the Seller and Luke Oil had a branding agreement with Citgo Petroleum Corporation.

On September 30, 2002, M & D entered into an "Assignment and Assumption of Citgo Petroleum Corporation Agreements" ("Assignment Agreement") with the Seller and Luke Oil, in accordance with the language of the purchase agreement. Id. at 25.

[1] M & D is also known as M & D of Michigan City, Indiana, Inc., and Smart Stop. Dabagia is the president of M & D and Mroueh is M & D's vice president.

Under the Assignment Agreement, M & D acknowledged that the Seller and Luke Oil had an "obligation to reimburse Citgo in the event that the Business is debranded for any reason and operated as other than a Citgo facility (the 'Debrand Obligations')." Id. M & D also agreed that "all the obligations under the Citgo Agreements, including the Debrand Obligations, [are] a material inducement . . . to sell the Business to [M & D]." Id. M & D then "agree[d] to assume and discharge, and pay in full, all obligations arising under the Citgo Agreements . . . including, but not limited to, the Debrand Obligations . . . ." Id.

On November 15, 2002, Mroueh and Dabagia each executed a personal guaranty for the obligations of M & D to Luke Oil "in consideration of Luke Oil . . . entering into certain agreements with and extending credit to [M & D]." Id. at 62, 64 (capitalization removed). Mroueh and Dabagia each "guarantee[d] the prompt payment at maturity of all indebtedness hereafter or heretofore so incurred by [M & D] to [Luke Oil] under the terms of any and all such agreements . . . ." Id.

At some point after all of the purchase documents were executed, M & D ceased operating the facility as a Citgo-branded facility. Thereafter, in September of 2003, Citgo informed Luke Oil of a breach in the branding obligations, and Citgo demanded Luke Oil pay $84,653.89 in damages. Luke Oil complied, requested reimbursement from M & D, and, after that request went unanswered, brought an indemnity suit against M & D, Dabagia, and Mroueh.

On March 20, 2007, Luke Oil filed a motion for summary judgment in which Luke Oil argued that it was "entitled to reimbursement of the debranding obligation."

Appellants' App. at 32 (capitalization removed). Mroueh and Dabagia also moved for summary judgment on March 20. In their motion, they argued that they did not "personally guarantee that they would be responsible for the [Assignment] Agreement," but rather that they "execute[d] personal guaranties with [Luke Oil] for future credit for gasoline." Id. at 37. And at the trial court's hearing on the summary judgment motions, counsel for M & D, Dabagia, and Mroueh clarified that "we're not disputing that [M & D] may be liable for the debranding, but we are disputing whether or not Hussein Mroueh and Phillip Dabagia are personally responsible. We believe that the personal guarantees simply do not apply." Id. at 113.

On June 19, 2007, the trial court entered its order on the summary judgment motions ("Order"). In its Order, the court found that Mroueh and Dabagia entered the purchase agreement, Assignment Agreement, and personal guaranties voluntarily and freely. The court also found that, "[a]lthough the individual defendants claim that the personal guaranty each of them executed does not apply . . . , the plain language of their separate guaranty instruments does not limit their responsibility to future credit for gasoline." Id. at 11. The court further found that "[t]he personal guaranty of each individual defendant provides for the prompt payment at maturity of all indebtedness incurred by M & D to the plaintiff, regardless of when it was incurred." Id. The court then concluded that "the personal guaranties of the Defendants Mroueh and Dabagia are implicated to make such payment by the unambiguous language of each of the instruments." Id. Accordingly, the court entered judgment in favor of Luke Oil.

Mroueh and Dabagia filed a motion to correct error, which the court denied. This appeal ensued.

DISCUSSION AND DECISION

Our standard of review for summary judgment appeals is well established. Asbestos Corp., Ltd. v. Akaiwa, 872 N.E.2d 1095, 1096 (Ind. Ct. App. 2007) (citing Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 908 (Ind. 2001)). An appellate court faces the same issues that were before the trial court and follows the same process. Id. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having its day in court. Id.

Summary judgment is appropriate only if the pleadings and evidence sanctioned by the trial court show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. (quoting Cobb, 754 N.E.2d at 909). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Id. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id. However, summary judgment is especially appropriate in the context of contract and statutory interpretation because their constructions are questions

of law. See, e.g., Von Hor v. Doe, 867 N.E.2d 276, 278 (Ind. Ct. App. 2007), trans. denied.

Although the parties address "three issues" in their briefs, it appears that Mroueh and Dabagia in fact raise at least six different claims of trial court error. Specifically, they assert each of the following arguments as grounds for reversing the court's Order: (1) the Assignment Agreement "could be invalid as it relates to Luke Oil for lack of consideration," Appellants' Brief at 6; (2) the judgment against Mroueh and Dabagia is invalid because "the liability of the principle [sic] [has not been] established," id. at 7; (3) Luke Oil's summary judgment motion only requested the court "to determine the nature, extent and validity of the guaranties" and was not a request for final judgment, id. at 8; (4) there is no clear evidence of Luke Oil's purported damages; (5) the personal guaranties do not clearly reference the Assignment Agreement; and (6) affidavits submitted by Mroueh and Dabagia regarding their understanding of the personal guaranties created a genuine question of material fact as to the scope of those guaranties. We address each argument in turn.

Mroueh and Dabagia's first, second, third, and fourth arguments are wholly unsupported by the record and waived. First, Mroueh and Dabagia did not challenge the alleged lack of consideration at the trial court level and cannot now raise that issue on appeal. See Huntington v. Riggs, 862 N.E.2d 1263, 1269 (Ind. Ct. App. 2007) ("As we have stated numerous times before, issues not raised before the trial court on summary judgment cannot be argued for the first time on appeal and are therefore waived." (quotation and citation omitted)), trans. denied. Second, Mroueh and Dabagia, by

counsel, conceded the liability of M & D during the summary judgment proceedings and cannot now assert that that question has been somehow left unresolved. See Perry v. Gulf Stream Coach, Inc., 871 N.E.2d 1038, 1047 (Ind. Ct. App. 2007) (citing Mitchell v. Falter, 126 Ind. App. 34, 126 N.E.2d 769, 774 (1955)). Third, Luke Oil's summary judgment motion plainly requests final judgment against Mroueh and Dabagia in the amount of $84,653.89. See Appellants' App. at 32-33. And fourth, Mroueh and Dabagia at no time during the summary judgment proceedings objected to Luke Oil's alleged damages; accordingly, they cannot now complain about those damages. See Huntington, 862 N.E.2d at 1269.

Mroueh and Dabagia's two additional assertions regarding their personal guaranties are likewise without merit. In their first assertion, Mroueh and Dabagia contend that their personal guaranties did not clearly reference the Assignment Agreement. Specifically, they assert that if the guaranties did cover the Assignment Agreement, they would not have been executed a month and a half after the Assignment Agreement and they would have included all the parties to the Assignment Agreement. And in their next assertion, Mroueh and Dabagia contend that their affidavits "as to their understanding" of the personal guaranties "create[d] a genuine issue of material fact." Appellants' Brief at 9.

Both of Mroueh and Dabagia's arguments pertaining to the guaranties ignore Indiana's well-established law of contract interpretation. Namely, the court will attempt to determine the parties' intent when entering a contract from their expressions within the four corners of the written instrument. See, e.g., City of Lawrenceburg v. Milestone

Contrs., L.P., 809 N.E.2d 879, 883 (Ind. Ct. App. 2004), trans. denied. Here, the four corners of the personal guaranties plainly state that Mroueh and Dabagia each "guarantee the prompt payment at maturity of all indebtedness hereafter or heretofore so incurred by [M & D] to [Luke Oil] under the terms of any and all such agreements . . . ." Appellee's App. at 62, 64. That language unambiguously manifests Mroueh and Dabagia's intent to be personally responsible for "all indebtedness hereafter or heretofore"[2] owed by M & D to Luke Oil, despite the fact that the guaranties do not specifically identify the Assignment Agreement. And Mroueh and Dabagia's subsequent, self-serving affidavits to the contrary are irrelevant in light of the unambiguous language of the guaranties.

The trial court's grant of summary judgment to Luke Oil is affirmed in all respects.

Affirmed.

DARDEN, J., concurs.

BROWN, J., dissents with separate opinion.

[2] The dissent seems to disregard this language in the guaranties. Further, while the dissent asserts that "[t]he guaranties do not identify a separate consideration," slip op. at 5, each guaranty specifically states that it is executed "IN CONSIDERATION OF Luke Oil . . . entering into certain agreements with and extending credit to [M & D] . . . ." Appellants' App. at 89, 91.

IN THE
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HUSSEIN MROUEH and PHILLIP K. DABAGIA, Appellants-Defendants, vs. LUKE OIL, INC., Appellees-Plaintiffs.	))))))))))))	No. 45A05-0711-CV-611

BROWN, Judge Dissenting

I respectfully dissent from the majority's conclusion that the guaranties are unambiguous in favor of Luke Oil. I conclude that the guaranties are ambiguous and lack consideration and, thus, that the trial court erred by granting Luke Oil's motion for summary judgment.

Mroueh and Dabagia argue that the personal guaranties were for future purchases of gasoline from Luke Oil, that the personal guaranties did not include the Assignment Agreement, and that any ambiguity in the personal guaranties should be resolved in their favor. Appellants' Brief at 10. The majority finds this issue waived for failure to raise the issue to the trial court and for failure to present citation to legal authority. However,

my review of the record reveals that Mroueh and Dabagia did make these arguments to the trial court. Appellants' Appendix at 66. Although their arguments both on appeal and to the trial court were not particularly well crafted, I would address the issue.

A guaranty has been defined as a contract by which the guarantor undertakes in writing, upon sufficient consideration, to answer for the debt of another person. Boonville Convalescent Ctr., Inc. v. Cloverleaf Healthcare Serv., Inc., 790 N.E.2d 549, 557 (Ind. Ct. App. 2003), reh'g granted on other grounds by 798 N.E.2d 248 (Ind. Ct. App. 2003), trans. denied. The interpretation of a guaranty is governed by the same rules applicable to other contracts. Noble Roman's, Inc. v. Ward, 760 N.E.2d 1132, 1137-1138 (Ind. Ct. App. 2002). In construing a guaranty, we must give effect to the intentions of the parties, which are ascertained from the language of the contract in light of the surrounding circumstances. Id. at 1138. Absent ambiguity, the terms of a contract will be given their plain and ordinary meaning and will not be considered ambiguous solely because the parties dispute the proper interpretation of the terms. JSV, Inc. v. Hene Meat Co., Inc., 794 N.E.2d 555, 560 (Ind. Ct. App. 2003), reh'g denied.

"Generally, the nature and extent of a guarantor's liability depends upon the terms of his contract, and a guarantor cannot be made liable beyond the terms of the guaranty." Id. A guarantor's liability will not be extended by implication beyond the terms of his or her contract. S-Mart, Inc. v. Sweetwater Coffee Co., Ltd., 744 N.E.2d 580, 586 (Ind. Ct. App. 2001), trans. denied. "A guarantor is a favorite in the law and is not bound beyond the strict terms of the engagement." Id. "However, the terms of a guaranty should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so

loosely interpreted as to relieve the guarantor of a liability fairly within [its] terms." Noble Roman's, 760 N.E.2d at 1138. Moreover, "a guaranty of a particular debt does not extend to other indebtedness not within the manifest intention of the parties." S-Mart, 744 N.E.2d at 586.

Writings executed at the same time and relating to the same transaction or subject matter will be construed together in determining the intent underlying the contracts. Noble Roman's, 760 N.E.2d at 1138. Thus, the guaranty and any other contemporaneous written agreements it incorporates must be construed together in order to determine the parties' intentions. Id. The application of this rule should not be arbitrary but rather should depend upon the facts of each particular case. Beradi v. Hardware Wholesalers, Inc., 625 N.E.2d 1259, 1261 (Ind. Ct. App. 1993), reh'g denied, trans. denied.

Three agreements, each executed months apart, are at issue here. In June 2002, M&D executed a purchase agreement for the purchase of a gas station from Saylor and Vista. As part of the purchase agreement, M&D agreed to "assume in writing and be bound by all written agreements still in effect" between Saylor and Vista and Luke Oil or Citgo. Appellants' Appendix at 69. It is unclear from the record when the purchase was finalized. However, in September 2002, M&D entered into the Assignment Agreement with Saylor, Vista, and Luke Oil. Id. at 80. In the Assignment Agreement, M&D assumed Saylor, Vista, and Luke Oil's debrand obligations to Citgo and agreed to indemnify Saylor, Vista, and Luke Oil. Id. at 80-81. Months later, in November 2002, Mroueh and Dabagia each executed personal guaranties to Luke Oil, which provided, in part:

> IN CONSIDERATION OF Luke Oil (hereinafter referred to as "Creditor") entering into certain agreements with and extending credit to SMART STOP state of IND (hereinafter referred to as "Principal Debtor"), and in order to induce guarantee the prompt payment at maturity of all indebtedness hereafter or heretofore so incurred by the Principal Debtor to Creditor under the terms of any and all such agreements and extensions of credit.

Id. at 89, 91.

Because the guaranties do not reference the Assignment Agreement and because the guaranties and Assignment Agreement were not executed together, we do not construe the agreements together to determine the parties' intent. Cf. Beradi, 625 N.E.2d at 1261 (holding that, where the continuing guaranty, the membership agreement, and the two personal financial statements were all dated May 7, 1990, and were submitted together as part of the application for membership, it was reasonable to conclude that these documents dealt with the same transaction and subject matter and could be construed together for purposes of determining the true intent of the parties to the guaranty). Rather, we must look solely at the language of the guaranties.

The language of the guaranties does not lend clarity to the issue. Looking only at their language, I conclude that the guaranties are ambiguous. Certainly, reasonable minds could differ regarding an interpretation of the phrase "in order to induce guarantee the prompt payment . . . ." Appellants' Appendix at 89, 91 (emphasis added). The question arises, who is being induced, and, more importantly, what is that party being induced to do? Further, the guaranties first refer to "certain" agreements without specifying which agreements are included. The guaranties then state that the only indebtedness guaranteed is the indebtedness "so incurred . . . under the terms of any and

all such agreements and extensions of credit", not all agreements or all extension of credit entered into, again, raising a question: what are those specific agreements and specific extensions of credit which are being guaranteed? (emphasis added).

Moreover, I note that "[w]hen a guaranty is executed contemporaneously with the contract it supports, no separate consideration is required for the guaranty." Boonville Convalescent Ctr., 790 N.E.2d at 557. Because the Assignment Agreement was executed at a different time, a separate consideration would be required for Mroueh and Dabagia to personally guarantee M&D's liabilities under the Assignment Agreement. The guaranties do not identify a separate consideration. Past consideration would not suffice. Jackson v. Luellen Farms, Inc., 877 N.E.2d 848, 858 (Ind. Ct. App. 2007) ("Past consideration can generally not support a new obligation or promise."). Both Mroueh and Dabagia submitted affidavits in response to Luke Oil's motion for summary judgment stating that the guaranties were for future credit for gasoline purchases. Appellants' Appendix at 78, 84. Further, Luke Oil's president stated in an affidavit that Mroueh and Dabagia executed the personal guaranties "as a material inducement to sell motor fuels to M&D, Inc." Appellee's Appendix at 71 (emphasis added).

In summary, although M&D clearly agreed to indemnify Luke Oil for the debranding obligations to CITGO in the Assignment Agreement, I find the guaranties ambiguous as to whether Mroueh and Dabagia agreed to personally guarantee those indemnifications under the Assignment Agreement. Furthermore, no separate consideration was identified in the guaranties. For these reasons, I would reverse the trial

court’s grant of summary judgment in favor of Luke Oil and remand for further proceedings.